

KCC 4983  
(K-C 19,380)  
PATENT

being unpatentable over DeClercq et al. (U.S. 2002/0128170).

Claim 1 is directed to a liquid color changing cleansing product comprising a first lamellar structured liquid and a second lamellar structured liquid. The first lamellar structured liquid comprises from about 10% (by weight) to about 80% (by weight) of a first surfactant, from about 0.1% (by weight) to about 10% (by weight) of a first electrolyte, and from about 0.001% (by weight) to about 10% (by weight) of a first coloring agent. The second lamellar structured liquid comprises from about 10% (by weight) to about 80% (by weight) of a second surfactant, from about 0.1% (by weight) to about 10% (by weight) of a second electrolyte, and from about 0.001% (by weight) to about 10% (by weight) of a second coloring agent. The first coloring agent and the second coloring agent are different coloring agents.

DeClercq et al. disclose a liquid rinse-added fabric care composition that contains at least two visually distinct phases. One or more phases of the fabric care composition may comprise one or more fabric care agents selected from the group consisting of fabric softener actives, color care agents, perfumes, antibacterial agents, malodor control agents, ultraviolet protection agents, anti-abrasion, anti-wear and fabric integrity agents, and wrinkle control agents. Additionally, the fabric care composition contains less than about 5% (by weight) of a detergent active. As defined in DeClercq et al., a "detergent active" refers to detergent surfactants, primarily anionic surfactants known for their

KCC 4983  
(K-C 19,380)  
PATENT

deterstive action in removing soil and stains from fabrics.<sup>1</sup>

The fabric care composition of DeClercq et al. may optionally also include an electrolyte, phase stabilizer, a phase separation inducing polymer, and a solvent. When present, the composition comprises an electrolyte in an amount of from about 0.5% (by weight) to about 15% (by weight). In one embodiment, when the composition contains a phase stabilizer, the phase stabilizer can include nonionic surfactants in an amount of up to about 15% (by weight of composition).

The visually distinct phases of the fabric care composition may have different colors, hues, intensities, degrees of clarity, and densities. As such, in one embodiment, the fabric care composition can optionally comprise one or more dyes for the purpose of rendering the separate phases visually distinct. For example, as disclosed on page 23, paragraph 335, a first color may be associated with fabric softening agents in one phase, and a second color associated with a color care agent can be present in a second visually distinct phase.

As noted by the Office, DeClercq et al. fail to teach with sufficient specificity the liquid color changing cleansing product as required in claim 1, which comprises a first lamellar structured liquid and a second lamellar structured liquid, wherein each of the first lamellar structured liquid and the second lamellar structured liquid independently comprise from about 10% (by weight) to about 80% (by weight) of a surfactant, from about 0.1% (by weight) to about 10% (by weight) of a electrolyte, and from about 0.001% (by weight) to about 10% (by

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<sup>1</sup> U.S. 2002/0128170 at page 2, paragraph 18.

KCC 4983  
(K-C 19,380)  
PATENT

weight) of a coloring agent, and wherein the coloring agent of the first lamellar structured liquid is different than the coloring agent of the second lamellar structured liquid. The Office, however, states that it would have been obvious to one of ordinary skill in the art, at the time the invention was made, to formulate the liquid color changing product of claim 1 because DeClercq et al. suggest a liquid color changing product comprising the requisite components. Applicants respectfully disagree and assert that the reference does not teach all of the requirements of claim 1 nor does it provide sufficient motivation to modify the reference to arrive at claim 1.

In order for the Office to show a *prima facie* case of obviousness, M.P.E.P. §2143 requires that the Office must meet three criteria: (1) the prior art reference must teach or suggest all of the claim limitations; (2) there must be some suggestion or motivation, either in the reference itself or in the knowledge generally available to one of ordinary skill in the art, to modify the reference, and (3) there must be some reasonable expectation of success. The Office has clearly failed to meet its burden under (1) and/or (2) above, as DeClercq et al. fail to teach or suggest all of the claim limitations of Applicants' claim 1 and there is no motivation nor suggestion to modify the DeClercq et al. reference to arrive at Applicants' claim 1.

Regardless of whether the cited reference shows each and every element of the claimed invention (as noted above, Applicants' position is that the cited reference clearly does not show each and every element), M.P.E.P. §2142 requires the Office to show a reference that teaches all of the claimed

KCC 4983  
(K-C 19,380)  
PATENT

limitations along with some motivation or suggestion, either in the reference itself or in knowledge generally available to one skilled in the art, to modify the reference and arrive at the claimed subject matter.<sup>2</sup> The mere fact that the reference can be modified to arrive at the claimed subject matter does not render the resultant combination obvious, unless the prior art also suggests the desirability of the modification. In re Mill, 916 F.2d 680, 16 USPQ2d 1430 (Fed. Cir. 1990). A close reading of the cited references clearly indicates that one skilled in the art would not have been so motivated and, without Applicants' disclosure as a blueprint (which the Office had the benefit of utilizing), such a modification of the DeClercq et al. reference would not have been made.<sup>3</sup>

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<sup>2</sup>As further set forth in M.P.E.P. §2142, the burden is on the Examiner to provide some suggestion of the desirability of doing what the invention has done. To support the conclusion that the claimed invention is directed to obvious subject matter, the reference must either (1) expressly or impliedly suggest the claimed invention; or (2) the Examiner must present a convincing line of reasoning as to why the artisan would have found the claimed invention to have been obvious in light of the teachings of the reference.

<sup>3</sup>M.P.E.P. §2142 further provides that in order to reach a proper determination under 35 U.S.C. §103(a), the Examiner must step backward in time and into the shoes worn by the hypothetical "person of ordinary skill in the art" when the invention was unknown and just before it was made. Knowledge of Applicants' disclosure must be put aside in reaching this determination, yet kept in mind in order to determine the "differences." The tendency to resort to "hindsight" based upon Applicants' disclosure is often difficult to avoid due to the very nature of the examination process. However, as stated by the Federal Circuit, impermissible hindsight must be avoided and the legal conclusion must be reached on the basis of the facts

KCC 4983  
(K-C 19,380)  
PATENT

As noted above, DeClercq et al. disclose a liquid rinse-added fabric care composition that contains at least two visually distinct phases. Optionally, the fabric care composition can include a detergent active or a phase stabilizer; and further, surfactants are listed in both of the laundry lists for the optional detergent actives and phase stabilizers. Furthermore, the electrolyte and the dye are each optional ingredients in the fabric care composition. As such, in order to arrive at Applicants' claim 1, one skilled in the art must choose to add an optional detergent active or phase stabilizer, choose to add a surfactant as the detergent active or phase stabilizer, choose to add an electrolyte, and finally, choose to add one dye to the first phase of DeClercq et al.'s fabric care composition and a different dye to the second phase of the composition. As such, one skilled in the art would have to make five optional choices to arrive at each and every limitation of Applicants' claim 1. Furthermore, these choices would have had to be made without any teaching or suggestion by the cited reference regarding cleansing compositions that change color upon dispensing from a container.

With all due respect, it appears that the Office has used impermissible hindsight analysis and reconstruction when modifying the DeClercq et al. reference. Notably, it would be clear to one skilled in the art reading DeClercq et al. that optional ingredients such as detergent actives, phase stabilizers, electrolytes, and dyes could be added to the fabric

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gleaned from the prior art. Grain Processing Corp. v. American-Maize-Products, Co., 840 F.2d 902, 904 (Fed. Cir. 1988).

KCC 4983  
(K-C 19,380)  
PATENT

care composition. There are, however, a myriad of optional ingredients available for use in the Declercq et al. composition. What is important is that there is no motivation or suggestion to use the surfactants, electrolytes, and dyes as required in the product of claim 1 over any of the other numerous of optional ingredients described in the cited reference.

There is simply no motivation to modify the DeClercq et al. reference to arrive at the instant claim 1, and claim 1 cannot be said to be obvious in view of the cited reference.

Claims 2, 10, and 11 depend from claim 1 and are patentable for the same reasons as claim 1 set forth above, as well as for the additional elements they require.

Claim 17 is similar to claim 1 and further requires the first lamellar structured liquid to comprise a first hydrophilic thickener and the second lamellar structured liquid to comprise a second hydrophilic thickener. As such, claim 17 is patentable over the DeClercq et al. reference for the same reasons as claim 1 set forth above, as well as for the additional elements it requires.

Claims 18, 26, 27, and 33 depend from claim 17 and are patentable for the same reasons as claim 17 set forth above, as well as for the additional elements they require.

2. Rejection of Claims 12 and 28 Under 35 U.S.C. §103(a)

Reconsideration is requested of the rejection of claims 12 and 28 under 35 U.S.C. §103(a) as being unpatentable over DeClercq et al. in view of Hsu et al. (U.S. 2003/0139316).

Claims 12 and 28 depend from claims 1 and 17, respectively.

KCC 4983  
(K-C 19,380)  
PATENT

As such, claims 12 and 28 are patentable over DeClercq et al. for the same reasons as claims 1 and 17 set forth above. Specifically, DeClercq et al. fail to teach the liquid color changing cleansing product comprising a first lamellar structured liquid and a second lamellar structured liquid, wherein each of the first lamellar structured liquid and the second lamellar structured liquid independently comprise from about 10% (by weight) to about 80% (by weight) of a surfactant, from about 0.1% (by weight) to about 10% (by weight) of a electrolyte, and from about 0.001% (by weight) to about 10% (by weight) of a coloring agent, and wherein the coloring agent of the first lamellar structured liquid is different than the coloring agent of the second lamellar structured liquid.

Hsu et al. fail to overcome the above shortcoming. Specifically, Hsu et al. disclose a liquid detergent composition comprising at least two layers, a surfactant layer and an electrolyte layer. As such, the compositions include a surfactant, a transition metal inorganic electrolyte, and water. Preferably, the bottom electrolyte layer is colored using a colored electrolyte. Additionally, an agent such as a dye can optionally be added to the top surfactant layer so that the composition contains two distinct color layers.

Significantly, no where in Hsu et al. is it disclosed or suggested to use a composition having first and second lamellar structured liquids, each comprising from about 10% (by weight) to about 80% (by weight) of a surfactant, from about 0.1% (by weight) to about 10% (by weight) of a electrolyte, and from about 0.001% (by weight) to about 10% (by weight) of a coloring agent, and wherein the coloring agent of the first lamellar

KCC 4983  
(K-C 19,380)  
PATENT

structured liquid is different than the coloring agent of the second lamellar structured liquid. Specifically, the Hsu et al. composition comprises a surfactant in a top layer and an electrolyte in a bottom layer.<sup>4</sup> No where is it suggested to use both a surfactant and an electrolyte in both layers. As such, claims 12 and 28 are patentable over DeClercq et al. in view of Hsu et al.

3. Rejection of Claims 13-16 and 29-32 Under 35 U.S.C. §103(a)

Reconsideration is requested of the rejection of claims 13-16 and 29-32 under 35 U.S.C. §103(a) as being unpatentable over DeClercq et al. in view of Zhu et al. (U.S. 2003/0203830) and further in view of Wei et al. (U.S. 2004/0248748).

Claims 13-16 and 29-32 depend from claims 1 and 17, respectively. As such, claims 13-16 and 29-32 are patentable over DeClercq et al. for the same reasons as claims 1 and 17 set forth above. Specifically, DeClercq et al. fail to teach the liquid color changing cleansing product comprising a first lamellar structured liquid and a second lamellar structured liquid, wherein each of the first lamellar structured liquid and the second lamellar structured liquid independently comprise from about 10% (by weight) to about 80% (by weight) of a surfactant, from about 0.1% (by weight) to about 10% (by weight) of a electrolyte, and from about 0.001% (by weight) to about 10% (by weight) of a coloring agent, and wherein the coloring agent of the first lamellar structured liquid is different than the

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<sup>4</sup> See U.S. 2003/0139316 on page 6, at paragraph 97, and the



KCC 4983  
(K-C 19,380)  
PATENT

coloring agent of the second lamellar structured liquid.

Zhu et al. and Wei et al. both fail to overcome the above shortcoming. Specifically, Zhu et al. disclose an aqueous liquid laundry detergent composition that separates upon standing for at most 24 hours at ambient temperature. The composition comprises a detergent surfactant, an emulsifier, an oil, and an electrolyte. The detergent surfactant can be selected from anionic, nonionic, cationic, amphoteric, and zwitterionic surfactants, in an amount of from about 5% (by weight) to about 80% (by weight). The emulsifier has an HLB value of below about 8.5. Preferably, the composition contains from about 0.5% (by weight) to about 30% (by weight) of the electrolyte in order to attain a stable two-layered composition. Additionally, a colorant, such as a dye or pigment, may optionally be incorporated into the bottom layer of the composition.

Wei et al. disclose personal cleansing compositions that contain two separate phases under ambient conditions for at least 180 days. The compositions comprise a cleansing phase containing a surfactant and water and a separate benefit phase comprising at least one water in oil emulsion. In the cleansing phase, the surfactant is present at a concentration of from about 3% (by weight) to about 60% (by weight), and can include anionic, nonionic, zwitterionic, amphoteric surfactants, or combinations thereof. In one preferred embodiment, the cleansing phase further comprises an electrolyte and at least one alkanolamide, wherein the electrolyte is present in an

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Examples, Tables 1 and 2.

KCC 4983  
(K-C 19,380)  
PATENT

amount of from about 0.1% (by weight) to about 15% (by weight). The separate benefit phase can optionally include pigments, lakes, colorings, and the like.

Significantly, similar to Hsu et al., neither Zhu et al. nor Wei et al. disclose or suggest using a composition having first and second lamellar structured liquids, each comprising from about 10% (by weight) to about 80% (by weight) of a surfactant, from about 0.1% (by weight) to about 10% (by weight) of a electrolyte, and from about 0.001% (by weight) to about 10% (by weight) of a coloring agent, and wherein the coloring agent of the first lamellar structured liquid is different than the coloring agent of the second lamellar structured liquid. Specifically, the composition of Zhu et al. comprises a surfactant in a top layer and an electrolyte in a bottom layer.<sup>5</sup> The composition of Wei et al. discloses using a surfactant and electrolyte in the first phase and water in oil emulsion in the second phase. No where is it suggested in either one of the references to use both a surfactant and an electrolyte in both layers. As such, claims 13-16 and 29-32 are patentable over DeClercq et al. in view of Zhu et al. and further in view of Wei et al.

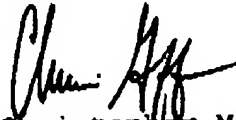
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<sup>5</sup> See U.S. 2003/0203830 in Examples 1-7.

KCC 4983  
(K-C 19,380)  
PATENT

In view of the above, Applicants respectfully request favorable reconsideration and allowance of all pending claims. The Commissioner is hereby authorized to charge any fee deficiency in connection with this Letter To Patent And Trademark Office to Deposit Account Number 19-1345 in the name of Senniger Powers.

Respectfully Submitted,



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